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JOSEPH F. SPANIOL, JR.
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No. 88-1130

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1988

NUTRI/SYSYTEM, INC., HAROLD KATZ, MARTIN S. BEGUN, THOMAS W. L. CAMERON, A. DONALD MCCULLOCH, JR., ALBERT J. DIMARCO, REEF C. IVEY, II AND JOHN E. SYLVESTER,
Petitioners,

v.

HENRY HERSKOWITZ, ALAN ROSMAN, JOSEPH FABIAN, NISSIM HUSNI, DONALD SUNSHINE and JACK POTOK and FRED POTOK, JOINT TENANTS, on behalf of themselves and all others similarly situated,
Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

REPLY BRIEF OF PETITIONERS

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All Issues Raised in the Petition for Certiorari Were Properly Presented Below

Respondents claim that two issues were not adequately preserved below, citing *Hoover v. Ronwin*, 466 U.S. 558, 574 n. 25 (1984), *reh. denied*, 467 U.S. 1268 (1984).

Petitioners in the instant case raised both issues (whether market price is presumptively conclusive of value and whether causation exists where there is a controlling shareholder) in the District Court.[1] The trial judge ruled against petitioners on both issues; the verdict nevertheless was in petitioners' favor, and plaintiff-respondent appealed. The Court of Appeals reversed. Petitioners then raised the issues in question at their first opportunity to do so, which was in their Petition for Rehearing.

In *City of Houston, Texas v. Hill*, 482 U.S. 451, 107 S.Ct. 2502, 2512 n. 16 (1987), this Court held that delay in raising the abstention issue did not bar the Court from addressing it, even though petitioner did *not* raise the issue in the District Court, where it had prevailed, and raised it for the first time in its Petition for Rehearing after a reversal by the Court of Appeals. *A fortiori* where petitioners, as was the case here, raised the issues in the District Court, those issues are properly before the Court.

Hoover v. Ronwin, *supra*, cited by respondents, is clearly inapplicable. The petitioner in that case failed to raise certain 5th and 14th Amendment issues in the District Court, where he *lost*, and again failed to raise them on appeal. The Court of Appeals reversed, on other grounds, and the petitioner for the first time raised the

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1. See Petition for Certiorari, note 6, pp. 5 and 6.

5th and 14th Amendment issues in his response to his adversary's motion for rehearing in the Court of Appeals.[2]

It is difficult to see how a defendant who wins before a jury at the District Court level can preserve dispositive legal defenses on an appeal by his adversary, except through a petition for rehearing following reversal. Otherwise a prevailing defendant, as appellee in the Court of Appeals, would have to burden the Court of Appeals by briefing all of the trial judge's erroneous rulings even though the verdict was in his favor.[3]

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2. Two other decisions of this court relied on by respondents are equally inapposite. In *Delta Airlines, Inc. v. August*, 450 U.S. 346 (1981) the defendant won in the District Court and claimed that because he had made a rejected settlement offer under F.R.C.P. 68, he was entitled to costs. The District Court disagreed and he appealed and the Court of Appeals affirmed. Before this Court, defendant raised the issue of the district judge's abuse of discretion in denying costs under Rule 54(d), an issue which he had not raised in the Court of Appeals or in the District Court. In *G. D. Searle & Co. v. Cohn*, 455 U.S. 404 (1982), the District Court held that a tolling statute was invalid under the Equal Protection Clause. Plaintiffs appealed. The Court of Appeals reversed, finding that there was a rational basis for the tolling provision. Before this Court plaintiffs-petitioners put forward a new due process argument, not previously raised anywhere, and this Court therefore refused to address it (455 U.S. at 412, n. 7).

3. In a slightly different context, respondents took a diametrically opposite position before the Court of Appeals than they take now. There, in response to a *cross-appeal* which Connecticut National Bank thought might be necessary in order to preserve an issue in the event of a reversal, respondent argued at length that the "practical consequence of permitting CNB to appeal in this case would be to create an intolerable burden on the appellate courts" which would "be besieged with requests for what would be, in effect, advisory opinions as to how lower courts should rule on issues that may be presented at some future time." (Brief for Cross-Appellees, pp. 35-37).

Respectfully submitted,

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4. The Rule 28.1 disclosure of Nutri/System Inc. is set forth in the Petition for Certiorari at page ii.